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share losses, but it is sufficient if they engage in an undertaking with a view to gain under an agreement that there is to be a community of interest in profits as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 26.]

3. Same—Accounting—Right.—In a partnership in a department in a retail business, one partner was entitled to an accounting against the other to ascertain the result of the enterprise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 129.]

4. Same—Capital and Services.—An agreement by which one party is to furnish the capital and the other his services to an enterprise, the profits to be divided between them without any special agreement as to losses, constitutes a partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 15]

GRASTY *v.* LINDSAY.

Nov. 21, 1907.

[59 S. E. 381.]

1. Trial—Instructions—Evidence to Sustain.—An instruction asked by defendant in an action for drilling a well, predicated on the fact that he had instructed the contractor to stop boring after a specified depth had been reached, was properly refused, where defendant himself testified that he never directed the contractor to stop work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596, 597, 604.]

2. Contracts—Actions—Instructions.—Where, in an action for drilling a well under a contract which gave the owner the right to stop the contractor at any time, the owner testified that he did not stop the contractor because of reliance on representations made by him, an instruction that the burden was on the owner to prove that a representation made by the contractor was untrue, and that the owner was misled thereby, was not objectionable as imputing to the owner a theory of defense which he did not entertain and which there was no evidence to support.

WILSON'S EX'R *v.* KECKLEY.

Nov. 21, 1907.

[59 S. E. 383.]

1. New Trial—Newly Discovered Evidence—Counter Affidavits.—On a motion for new trial for newly discovered evidence, counter affidavits may be considered.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, § 311.]

2. Same—Nature of Evidence.—The newly discovered evidence which will warrant the granting of a new trial must be such as ought on another trial to produce a different result.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, § 226.]

3. Same.—Newly discovered evidence which discredits witnesses of the successful party by showing that the witnesses testified falsely, and that it was impossible for them to have been witnesses to the fact testified to by them under the circumstances disclosed, does not require the granting of a new trial.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 221, 222.]

BROWN *v.* GIBSON'S EX'R.

Nov. 21, 1907.

[59 S. E. 384.]

1. Wills—Codicil—Construction.—Testatrix, by the fourth clause of her will, provided for the cancellation and surrender by her executor to the obligors of all notes, bonds, or other evidences of debt belonging to her and remaining unpaid at the date of her death, from whomsoever due. Testatrix executed a codicil, revoking such clause and providing in lieu thereof a direction that any note or other evidences of indebtedness remaining unpaid at the date of her death from certain specific individuals, including complainant, should be canceled and surrendered by her executor to the obligors in full satisfaction thereof. At her death testatrix held the obligations of all the persons named in the codicil, except complainant, who was not indebted to her, but was indebted to another on an unmatured obligation secured by a mortgage on her farm. Complainant was related to testatrix, but the other beneficiaries under the codicil were mere borrowers of her money. Held, that the codicil did not create an obligation on the part of the executor to purchase complainant's debt from the holder and cancel the same.

2. Same—Intent.—In the construction of a will, the inquiry is, not what testator intended to express, but what the words used do express.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 955.]

3. Same—"Surrender."—Where a codicil directed that the executor should surrender certain evidences of indebtedness against specified legatees, the word "surrender" implied possession on the part of testatrix, so as to exclude debt which testatrix did not own.